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# Ghosts of Alabama: The Prosecution of Bobby Frank Cherry for the Bombing of the Sixteenth Street Baptist Church

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# GHOSTS OF ALABAMA: THE PROSECUTION OF BOBBY FRANK CHERRY FOR THE BOMBING OF THE SIXTEENTH STREET BAPTIST CHURCH

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Perhaps no other crime in American history has shocked the conscience of America like the 1963 bombing of the Sixteenth Street Baptist Church in Birmingham, Alabama. Four girls, Addie Mae Collins, Carole Robertson, Cynthia Wesley, and Denise McNair, were killed while they were getting ready for church that Sunday morning, September 15, 1963.[1] Historians have pointed to the church bombing as the single event most responsible for shocking White America out of its apathy for the plight of African Americans and into action—action that led the following year to passage of the Civil Rights Act of 1964.[2]

In May of 2002—almost thirty-nine years after the bombing—Bobby Frank Cherry was brought to trial for the murders of Addie, Carole, Cynthia, and Denise. He was the last person to be tried for the bombing. As an Assistant United States Attorney in Birmingham, Alabama it was my privilege to be a part of the prosecution team that brought Cherry to justice. This Article tells the story of that prosecution and explores the question of whether such trials, so long after the events in question, serve any useful purpose. Part I describes the bombing and provides an historical overview of the events that led up to it. Part II chronicles the FBI investigation of the bombing in the 1960s and the subsequent prosecution of two of the bombers, Robert Chambliss and Tommy Blanton. In Part III, I discuss the Cherry prosecution itself.

Finally, Part IV attempts to address, at least tentatively, the question that I am asked most often about the case. While the other sections of the

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1. *See* TAYLOR BRANCH, PARTING THE WATERS 889–92 (Simon & Schuster 1988).

2. *See* DIANE MCWHORTER, CARRY ME HOME 572 (Simon & Schuster 2001). At a funeral for three of the girls, Reverend Martin Luther King, Jr. predicted that "[t]his tragic event may cause the White South to come to terms with its conscience." Rick Bragg, *38 Years Later, Last of Suspects is Convicted in Church Bombing*, N.Y. TIMES, May 23, 2002, at A1.

Article address how the case was prosecuted, this section asks: "why?" Was it really worth the expenditure of considerable resources so that an old man could die in prison? Although a full answer to the question of whether this prosecution, or any of the other recent high-profile civil rights trials in the South, was worth the cost is beyond the scope of this Article, Part IV proposes a conceptual model for such an analysis: principles gleaned from the rapidly expanding field of "transitional justice"—the transition in this case being that from the repressive regime of the American South in the 1960s and before to the modern democracy that is the "New South."

## I. THE BOMBING

In order to understand the events of Sunday, September 15, 1963, it is necessary to know what was going on in Birmingham at the time. In 1963 Birmingham, Alabama had what were likely the strictest segregation laws in the country. Nearly all public facilities in Birmingham, including theaters, bus stations, parks, lunch counters, restrooms, and water fountains, were segregated by race.[3] Moreover, "[t]here were no Black store clerks, secretaries, police officers, librarians, or firefighters."[4] Rather, employment for Blacks was limited largely to menial jobs like cooking, cleaning, and working in the city's various foundries.[5] In the spring of 1963 Reverend Martin Luther King, Jr. brought the Southern Christian Leadership Conference to Birmingham to join with local Black community leaders to challenge these laws.[6] The protestors' method of challenging the city's "Jim Crow" laws was to send groups of African Americans to attempt to integrate downtown stores and lunch counters. Although Reverend King and the other organizers' initial plan was to use sit-ins at the store lunch counters as their method of protest,[7] most marchers were arrested before they ever reached the stores and organizers eventually focused on getting the maximum number of people arrested.[8] The chief rallying point for the protestors, primarily because of its location several blocks from the downtown area stores, was the Sixteenth Street Baptist Church.[9] Reverend King preached at the church and the protestors used it as a place to gather together before marching to the

3. *See* FRANK SIKORA, UNTIL JUSTICE ROLLS DOWN: THE BIRMINGHAM CHURCH BOMBING CASE 6 (Univ. of Ala. Press 2005) (1991).

4. *Id.*

5. *Id.*

6. *See* MCWHORTER, *supra* note 2, at 307–10.

7. The Birmingham campaign was initially modeled after the successful 1960 sit-in campaign in Nashville. BRANCH, *supra* note 1, at 752.

8. *See id.* at 764.

9. SIKORA, *supra* note 3, at 6.

stores. Thus, the church became a symbol of the civil rights movement in a city where attempts to integrate were generally met with violence.[10]

Each time a group of protestors would violate the city's laws they would be arrested by the Birmingham Police Department. Soon the supply of African American adults willing to be arrested ran short and leaders of the movement began allowing children to march to the stores and to be arrested.[11] It was during this time period that the Birmingham Police and Fire Departments used police dogs and high pressure fire hoses in an attempt to control the marchers, resulting in the infamous pictures of dog and fire hose attacks on unarmed protestors.[12]

In May of 1963, Reverend King and the other movement leaders reached an agreement with the city's White business leaders.[13] The deal provided for desegregation of the downtown lunch counters, bathrooms, and water fountains and for the hiring of some Black sales clerks. The agreement was announced publicly at a press conference on May 10.[14] In a sign that change would not come peacefully to Birmingham, that night bombs exploded at the Gaston Motel, where Reverend King and the other movement leaders were staying, and at the home of King's brother.[15]

Racial tensions continued to mount through the summer of 1963. In June, Governor George Wallace stood in the schoolhouse door at the University of Alabama and attempted to prevent the registration of the university's first two Black students.[16] On August 28, 1963, the "March on Washington" gave the civil rights movement national exposure and culminated in Reverend King's famous "I Have a Dream" speech on the national mall.[17] Meanwhile, in Birmingham, on August 19 a federal judge approved the Birmingham Board of Education's plan to desegregate the city's public schools.[18] The plan was a modest one, calling only for the

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10. Bombings had become so common in the city that it had earned the nickname "Bombingham." *See* MCWHORTER, *supra* note 2, at 20. Between the end of World War II and 1963 there were more than forty bombings in Birmingham. Rick Bragg, *More Than Just a Racist? Now The Jury Must Decide*, N.Y. TIMES, May 22, 2002, at A18. Remarkably, until the bombing of the Sixteenth Street Baptist Church, no one was killed in any of these bombings. SIKORA, *supra* note 3, at 66.

11. The decision to allow children to march was a controversial one within the movement. *See* BRANCH, *supra* note 1, at 754–55; MCWHORTER, *supra* note 2, at 363.

12. *See* MCWHORTER, *supra* note 2, at 370–72.

13. SIKORA, *supra* note 3, at 7; *see* MCWHORTER, *supra* note 2, at 421–23.

14. SIKORA, *supra* note 3, at 7.

15. *Id.*

16. *See* BRANCH, *supra* note 1, at 821–22.

17. *See* MCWHORTER, *supra* note 2, at 487–90.

18. *Id.* at 481. The Board's plan was the culmination of more than three years of legal action by Black plaintiffs to integrate the Birmingham schools. In July of 1963, the United States Court of Appeals for the Fifth Circuit had ordered the Board to "make an immediate start in the desegregation of the schools of Birmingham, Jefferson County,

integration of three schools by a total of five Black students.[19] However, it represented the first time that Black and White school children would attend Birmingham public schools together—an act considered particularly repulsive by White extremists.[20] The Birmingham schools were scheduled to begin the school year on Wednesday, September 4. That morning two of the Black students, eleven-year-old Dwight Armstrong and his nine-year-old brother Floyd, went to Graymont Elementary School, picked up their enrollment forms, and left.[21] When several White protestors were injured in the ensuing fracas between police and White extremists gathered to protest the integration, Governor Wallace issued an executive order prohibiting integration of the public schools in order to "[preserve] the peace."[22] The following Monday, September 9, Wallace amended his order, allowing the schools to open but denying entry to Black students.[23] That afternoon the United States Court of Appeals for the Fifth Circuit issued a restraining order enjoining the Governor or anyone else from interfering with the Court's desegregation order.[24] When the Kennedy administration learned, in the early morning hours of September 10, that Wallace intended to call out the National Guard to prevent integration, President Kennedy signed an order federalizing the Guard and then Secretary of Defense McNamara ordered the Guard to return to their armory.[25] Thus, finally, on Tuesday morning, September 10, the Armstrong brothers and the other three Black schoolchildren entered the Birmingham public schools.[26]

The following Sunday, September 15, was to be "Youth Day" at the Sixteenth Street Baptist Church.[27] The church's pastor, Reverend John Cross, had recently decided to have monthly youth services and the 15th was scheduled to be the first, with the youth choir providing the music at

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Alabama, which plan shall effectively provide for the carrying into effect not later than the beginning of the school year commencing September 1963 .... " Armstrong v. Bd. of Educ., 323 F.2d 333, 339 (5th Cir. 1963).

19. *See* MCWHORTER, *supra* note 2, at 481.

20. *See id.* at 86. To the "Old Confederacy," "integrated primary and secondary schools meant mixing the races at the age that mating habits were being formed, raising the specter of miscegenation and, possibly, mass revolt." *Id.*

21. *See id.* at 494–95. The other three Black students, all high school age, did not attempt to enter school that day, instead intending to avoid at least some of the hostile crowds by waiting until Friday to attend school. *Id.* at 495.

22. *Id.* at 495–96.

23. *See id.* at 505.

24. *Id.* The joint restraining order was dictated by federal district judge Frank Johnson in Montgomery and signed by four other federal judges throughout the state. *See id.*

25. *Id.* at 506.

26. *See* BRANCH, *supra* note 1, at 888–89; MCWHORTER, *supra* note 2, at 506–07.

27. MCWHORTER, *supra* note 2, at 520.

the eleven o'clock service.[28] Five young girls who were to have a part in the service, Carole Robertson, Cynthia Wesley, Denise McNair, and Addie Mae Collins and her younger sister Sarah, were in the ladies lounge on the northeast side of the church primping for their role in the service.[29] At 10:22 a.m. a huge explosion rocked the church.[30] The blast came from underneath the exterior staircase on the northeast corner of the building, right outside the window to the ladies lounge.[31] The exterior wall and foundation, more than two feet thick of brick, stone, and mortar, came crashing down on the four girls, leaving a huge crater where the concrete stairs stood moments before.[32] Sarah Collins, who had been watching her older sister Addie tie the sash on the back of Denise McNair's dress, lay buried in the rubble blinded by the blast.[33] She called out for her sister: "Addie, Addie, Addie."[34] There was no answer.[35]

Reverend Cross led the congregation in looking for survivors.[36] They found one body, then another, and finally a total of four bodies.[37] A fifth girl, Sarah, was found alive.[38] She was taken to University Hospital, where doctors removed twenty-one pieces of glass from her face and eyes and more from her chest and legs.[39] She was in the hospital for two more months, finally regaining sight in her left eye, but losing her right eye altogether.[40] The other four girls were all dead on arrival at the hospital.[41] Family members identified the bodies of Addie, Carole, and Denise, but Cynthia Wesley's body was so badly damaged that she had to be identified by her shoes and the ring on her finger.[42]

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28. *Id.*

29. SIKORA, *supra* note 3, at 9–10.

30. MCWHORTER, *supra* note 2, at 522; SIKORA, *supra* note 3, at 11.

31. MCWHORTER, *supra* note 2, at 525; SIKORA, *supra* note 3, at 9. This exterior staircase was completely destroyed in the blast and never rebuilt. Today what was once the second story door to which the staircase led is now a window, making it difficult to tell where the stairs even stood in 1963.

32. *See* MCWHORTER, *supra* note 2, at 525; SIKORA, *supra* note 3, at 11.

33. SIKORA, *supra* note 3, at 10–11; *see* MCWHORTER, *supra* note 2, at 523.

34. MCWHORTER, *supra* note 2, at 523; SIKORA, *supra* note 3, at 11.

35. SIKORA, *supra* note 3, at 11.

36. *See* MCWHORTER, *supra* note 2, at 524–25.

37. *See* SIKORA, *supra* note 3, at 13.

38. MCWHORTER, *supra* note 2, at 525; SIKORA, *supra* note 3, at 13.

39. SIKORA, *supra* note 3, at 15.

40. *See id.* ("When she was released, she could see from the left eye but had a glass right eye.")

41. *See id.*

42. MCWHORTER, *supra* note 2, at 527.

## II. THE INVESTIGATION AND EARLIER PROSECUTIONS

The Federal Bureau of Investigation immediately became involved in the investigation of the church bombing.[43] Agents arrived at the bombing scene, taking control of the scene away from state investigators sent by Governor Wallace.[44] By modern standards, evidence collection at the scene of the bombing was haphazard at best. One of the great mysteries of the investigation involves pieces of a fishing bobber—which could have been used as part of some sort of timing device to set off the bomb—that were found at the scene.[45] The bobber pieces never reached the FBI's crime lab and a forensic report sent to FBI headquarters said that nothing useful had been found at the scene.[46] The lack of a meaningful crime scene investigation would haunt prosecutors for decades—at each trial the prosecution would be left to speculate as to the bomb's composition.[47]

Over the next several years, FBI agents conducted hundreds of interviews with potential witnesses and suspects. Fairly early in the investigation, four Ku Klux Klansmen emerged as the prime suspects thought to have placed the bomb at the church: Robert Chambliss, Tommy Blanton, Bobby Frank Cherry, and Herman Cash.[48] One by one, these initial suspects would be defendants in a series of prosecutions spanning the next thirty nine years. All but Herman Cash, who died in 1994

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43. By the night of the bombing, twenty five FBI agents had been sent to Birmingham. ANDREW M. MANIS, A FIRE YOU CAN'T PUT OUT 403–04 (Univ. of Ala. Press 1999).

44. *See* MCWHORTER, *supra* note 2, at 549.

45. A fishing bobber (a floating piece of cork or plastic attached to fishing line to keep bait floating at a specific depth) could have been used in a crude timing device consisting of a fluid-filled and leaking container. Such a timer could be devised to trigger a bomb to go off when the fluid drained to a certain level, allowing the bobber to close an electric circuit. FBI Special Agent John McCormick testified at the trial of Robert Chambliss that he was present when other agents found the bobber evidence, but that he did not know what happened to it. SIKORA, *supra* note 3, at 150.

46. MCWHORTER, *supra* note 2, at 533. An FBI report later conceded that the bobber evidence had existed. *Id.* at 654 n.533 (citing Interview with Maurice House, Spring 1985; James R. Logan Jr. report, Oct. 4, 1963; Zimmers and Killion memorandum on investigation of site). There has never been a satisfactory explanation as to what happened to it.

47. In the trial of Robert Chambliss, two fire marshals testified that they smelled dynamite at the scene and that the damage at the church was not consistent with the type of damage that would have been caused by a natural gas explosion. SIKORA, *supra* note 3, at 151–52. In the prosecutions of Tommy Blanton and Bobby Frank Cherry, prosecutors would limit their proof to testimony that the blast was caused by "high order" explosives—that is, a bomb as opposed to some other type of explosion, such as a gas leak or boiler explosion. *See* SIKORA, *supra* note 3, at 196, 230–31.

48. *See* MCWHORTER, *supra* note 2, at 516.

without ever being tried in the bombing, would eventually be convicted.[49]

The FBI's jurisdiction to investigate the bombing as a federal crime was based on a Reconstruction-era civil rights statute that had a five year statute of limitations.[50] Thus, when no charges had been brought against anyone by September 15, 1968, any chance of federal prosecution for the bombing ended. Even before this time, however, FBI Director J. Edgar Hoover had effectively ended any chance of federal prosecution by not allowing his Birmingham office to turn its evidence over to federal prosecutors.[51] In retrospect, much has been made of the FBI's failure to pursue prosecution in the 1960s. However, in fairness to the Bureau, it is difficult to imagine that, based on the evidence collected in the 1960s, a successful prosecution could have been mounted against any of the suspects at the time in front of a Birmingham, Alabama jury.[52]

In 1970 twenty-eight-year-old Bill Baxley (who had been a law student at the University of Alabama at the time of the 1963 church bombing) was elected Attorney General of the state of Alabama.[53] By all accounts, Baxley took a very personal interest in the bombing and made the investigation and prosecution of those responsible a priority in the Attorney General (AG)'s office.[54] Baxley soon realized, however, that any meaningful investigation would require access to the FBI's files on the case. For the next five years Baxley tried, without success, to gain access to the FBI files. Finally, in 1975, Baxley enlisted the aid of Talladega, Alabama native Jack Nelson, the Washington bureau chief for the *Los Angeles Times*.[55] After Nelson contacted U.S. Attorney General Edward Levi and implied that he was going to write a story about the FBI's refusal to cooperate with Alabama authorities in the church bombing investigation, Baxley suddenly gained access to at least some of the FBI files.[56]

For the next two years, Baxley and his prosecutors and investigators poured over the FBI files and interviewed witnesses. After extensive

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49. *See* Rick Bragg, *Alabama Faces Old Wound In One Last Trial*, N.Y. TIMES, May 12, 2002, at A1.

50. *See* 18 U.S.C. § 3282 (2000).

51. *See* MCWHORTER, *supra* note 2, at 574.

52. Such a jury would have been composed solely of White males. SIKORA, *supra* note 3, at ix–x. While it is true that several all-White juries of that time period returned guilty verdicts against White defendants, *id.* at x, the real problem is that FBI investigators had very little evidence against any of the suspects at the time.

53. MCWHORTER, *supra* note 2, at 573; *see* Rick Bragg, *Alabama Faces Old Wound In One Last Trial*, N.Y. TIMES, May 12, 2002, at A1.

54. Baxley reportedly carried with him at all times a card with the names of the four victims, one name in each corner, to remind himself of a vow he made the day of the bombing to bring the killers to justice. MCWHORTER, *supra* note 2, at 573.

55. SIKORA, *supra* note 3, at 51.

56. *Id.* at 51–52.

research and investigation, the AG's team reached the same conclusion that FBI agents had reached a decade before: the evidence pointed to Chambliss, Blanton, Cherry, and Cash as those most likely to have placed the bomb. Of the four, the case was clearly strongest against Chambliss. This was true because (as described below) two witnesses could provide damaging testimony against Chambliss, but not the other three.

The first witness who implicated Chambliss was an African American woman named Kirthus Glenn. Ms. Glenn had been visiting her hometown of Birmingham from Detroit at the time of the bombing.[57] At approximately two o'clock on the morning of September 15, Glenn was about a block north of the church when she saw something that caught her attention: a car with three White men.[58] Because the car's interior dome light was on, Ms. Glenn was able to get a good look at one of the men. Later shown photos by the FBI, she identified the man she saw in the car that night as looking like Robert Chambliss.[59] Glenn was even more certain about the car in which she saw the men. When shown a photo of Tommy Blanton's white–on-blue 1957 Chevrolet, she said that the car was identical to the car she saw that night near the church.[60]

The second witness who could provide damaging testimony against Chambliss was his niece, Elizabeth Cobbs. Cobbs told Baxley that she had heard three different incriminating statements by Chambliss. First, on the day before the bombing, he told her that he "had enough stuff put away to flatten half of Birmingham."[61] Later that same day, Chambliss said "[y]ou just wait until after Sunday morning . . . they [the Blacks] will beg us to let them segregate."[62] Finally, approximately a week later while watching a news broadcast about the bombing, Chambliss said "it wasn't meant to hurt anybody. It didn't go off when it was supposed to."[63]

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57. MCWHORTER, *supra* note 2, at 516.

58. *See id.* Because the church was located in a predominately Black part of a very segregated Birmingham, the presence of three White men would have been quite unusual at the time.

59. *Id.* at 563.

60. *Id.* at 516, 563. Investigators believe that Ms. Glenn saw the bombers after they had dropped off a fourth man—apparently Bobby Frank Cherry—to carry the bomb down the alley behind the church and place it under the stairs on the far side of the church (this would explain why Glenn saw two men in the back seat and only one in front). *See id.* at 516. The alley would have provided the most concealed route to the stairs at the northeast corner of the church. Obviously, Glenn would have been an important witness in the later Blanton and Cherry trials, but she died after the trial of Robert Chambliss.

61. SIKORA, *supra* note 3, at 142.

62. *Id.* at 143.

63. *Id.* at 144.

In September of 1977, Chambliss was indicted for the murder of Carole Denise McNair in the church bombing case.[64] He went to trial in November of that year and—based largely on the testimony of Kirthus Glenn and Elizabeth Cobbs—was convicted.[65] Chambliss received a life sentence and died in prison on October 19, 1985.[66]

For more than fifteen years after the conviction of Robert Chambliss in 1977, there was no further attempt to bring the other suspected bombers to justice. Then, in 1994 FBI Special Agent Rob Langford, the Special Agent in Charge of the Birmingham FBI office, met with leaders of Birmingham's African American community in an attempt to improve relations between the FBI and the Black community.[67] While the reopening of the church bombing investigation was not a subject that Langford had in mind, the community leaders brought it up, indicating their dissatisfaction with the FBI's earlier investigation. Langford promised to look into the matter, and in 1995 reopened the investigation into the church bombing.[68]

FBI Special Agent Bill Fleming was the agent assigned to reinvestigate the church bombing case. The Birmingham Police Department also assigned an officer to the case, an experienced detective named Ben Herren. Fleming and Herren decided to read the entire FBI file on the case—approximately eight thousand pages—and develop a list of people they would like to interview. When they had finished reading the file there were more than five hundred names on the list.[69] Of this number, they found that many had already died while many others could not be located.[70]

Initially the investigation appeared to be headed nowhere. Fleming and Herren were surprised to find that, despite the number of years that had passed, none of those they interviewed provided any significant new information on the case. Most were still utterly unrepentant about their racial beliefs and claimed to remember nothing.[71]

In July of 1997, however, the investigation finally got a break. On the 10th of July, the FBI publicly announced the reopening of the church

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64. *Id.* at 116–17.

65. *See* MCWHORTER, *supra* note 2, at 574.

66. *Id.* at 575; SIKORA, *supra* note 3, at 156.

67. SIKORA, *supra* note 3, at 169–70.

68. *Id.* at 170–71. Because the statute of limitations had run on any possible federal charges, Langford spoke with Jefferson County District Attorney David Barber before reopening the investigation. Barber agreed that if the FBI found evidence sufficient to charge anyone, his office would assist in prosecuting for murder in state court. *Id.* Alabama, like most states, has no statute of limitations for murder. ALA. CODE § 15-3-5 (1975).

69. SIKORA, *supra* note 3, at 174–75.

70. *Id.* at 175.

71. *See id.*

bombing investigation. Reacting to the news, reporters tracked down Bobby Frank Cherry (who, along with Tommy Blanton, was one of only two of the four original suspects still living) in Mabank, Texas. Approximately one week after the FBI's announcement Cherry—apparently tired of issuing denials of his involvement to one reporter at a time—called a press conference. In this news conference Cherry said that he had nothing to do with the bombing of the Sixteenth Street Baptist Church.[72] Cherry apparently thought that this would end the matter. It had, however, quite a different effect.

In response to Cherry's public denial, several potential witnesses contacted the FBI. Teresa Stacey, one of Cherry's granddaughters, called to say that he had bragged to her and other family members for years of his involvement in the bombing.[73] Michael Wayne Gowins, who met Cherry only briefly in the early 1980's in Dallas, called to say that Cherry had once said to him, in a conversation about the church bombing, "[y]ou know I bombed that church."[74] Word of Cherry's denial also reached Montana, where one his ex-wives, Willadean Brogdon, lived. Brogdon drove more than two hundred miles to an FBI office and offered information about Cherry's involvement in the bombing.[75]

Over the next three years these witnesses, along with numerous others, were called to testify before a federal grand jury in Birmingham. Finally, in May of 2000, federal and state prosecutors, led by United States Attorney Doug Jones, took the case before a Jefferson County Grand Jury.[76] In the same month, Bobby Frank Cherry and Tommy Blanton were charged and arrested for the murders of Addie Mae Collins, Carole Robertson, Cynthia Wesley, and Denise McNair.[77]

Despite the indictments, prosecutors would not have called the case against either Cherry or Blanton a strong one at this point. The case against Cherry was based largely on his alleged bragging, all of which occurred years after the bombing. The case against Blanton was even more tenuous. Prosecutors drew some comfort, however, from the fact that the cases would at least be tried together in one trial, because then the evidence against both defendants would be before the jury and the jury

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72. *Id.* at 178.

73. *See id.* at 178–79.

74. Transcript of Record at Vol. 10, p. 224, Bobby Frank Cherry v. State of Alabama, 933 So. 2d 377 (2004) (No. CR-02-0374) [hereinafter "Record"].

75. Record at Vol. 10, pp. 150–51.

76. Despite the fact that the case had been investigated for more than three years by a federal grand jury, since federal juries cannot indict for violations of state laws, the case had to be presented to a state grand jury for indictment. *See generally* ALA. R. CRIM. P. 1.1 and 12.8 (Alabama state/county grand juries indict for violations of laws passed by the state of Alabama).

77. *See* MCWHORTER, *supra* note 2, at 586.

would hopefully find enough to convict both men. In November of 2000, however, this strategy fell apart when Cherry produced evidence that he might not be competent to stand trial. At a hearing on the issue, two experts testified that Cherry suffered from dementia.[78] Finding grounds to believe that he might not be mentally competent to assist in his own defense, presiding Judge James Garrett continued the case against Cherry indefinitely while he attempted to determine Cherry's competence to stand trial. Thus, it appeared that the more difficult case—the one against Tommy Blanton—would have to proceed to trial on its own. It was at this point that prosecutors got their second big break in the case.

While preparing for the Blanton trial, prosecutors asked Fleming and Herren to make one last check of all evidence that the Government had in the church bombing case so that all appropriate discovery materials could be provided to Blanton's attorney.[79] In conducting this final check, the investigators came across a box containing numerous audio tapes. Fleming and Herren discovered that these tapes had been made less than a year after the bombing by a microphone that had been placed under the kitchen sink in the house where Blanton lived. The device had been placed when an FBI undercover agent, posing as a truck driver, rented the apartment adjacent to Blanton's. An FBI surveillance team had drilled under the sink and had placed a microphone there, with a wire running back to the rented apartment. The tapes consisted largely of hours of silence, punctuated by unintelligible or meaningless conversations. However, Fleming and Herren discovered that one of the recordings was a breakthrough. This particular tape—which prosecutors came to call the "kitchen tape"—contained a conversation that was recorded approximately nine months after the church bombing.[80] The incriminating portion of the tape, which lasted just over a minute, involved a discussion between Tommy Blanton and his wife Jean regarding Jean's interview by the FBI.[81] On the tape, Blanton acknowledges that he knew the FBI was "interested in that meeting that I went to."[82] When Jean asks him to clarify what meeting he is talking about, Blanton responds "the Big One."[83] When Jean again asks for clarification, Blanton says that it was "[t]he meeting where we planned the bomb."[84] Jean then conveniently

78. Record at Vol. 3, pp. 461–64.

79. *See* SIKORA, *supra* note 3, at 187.

80. *See* Record at Vol. 7, pp. 1402–03.

81. *See id.* Jean and Tommy Blanton were married in April 1964. SIKORA, *supra* note 3, at 187. They later divorced and Jean (by the time of the trials her last name was Barnes) was called as a witness by the State in the Cherry trial. *Id.* at 237.

82. Record at Vol. 7, p. 1402.

83. *Id.*

84. *Id.* At two other times in the conversation Blanton goes even further, saying that the meeting was to "make the bomb." Record at Vol. 7, pp. 1402–03.

establishes the exact date of the meeting in question by stating "[i]t's what you were doing that Friday night when you stood me up," to which Blanton responds "[o]h, we were making the bomb."[85] Jean later testified, and in fact it appears to be undisputed, that the night she was referring to—the Friday that Blanton stood her up—was Friday, September 13, 1963—two days before the church was bombed.[86]

In April of 2001, Tommy Blanton went on trial for the 1963 church bombing murders.[87] Based largely on his owns words, heard by jurors on the "kitchen tape," Blanton was convicted.[88] He was sentenced to imprisonment for life[89] and is still serving his sentence in the Alabama state prison system.

## III. ALABAMA V. BOBBY FRANK CHERRY

Following the success of the Blanton prosecution, it appeared that the church bombing case had run its course. Two of the four original suspects had been convicted, while a third, Herman Cash, had died without ever being charged.[90] Meanwhile, in July of 2001 Judge Garrett ruled that prosecutors had not shown that Cherry was mentally competent to stand trial.[91] Before closing the books on the case, however, Judge Garrett took one more step. In August, he ordered that Cherry be committed to the Alabama Department of Mental Health and Mental Retardation's secure medical facility at Taylor Hardin for further testing to determine his mental competence.[92]

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85. Record at Vol. 7, p. 1403.

86. SIKORA, *supra* note 3, at 237. Another mystery of the case is why the FBI never discovered the "kitchen tape" before 2001. One possible explanation lies in the fact that the clandestine taping of Blanton's conversations was part of an intelligence gathering operation designed to prevent future bombings and, as such, the recordings were never meant to be used in court and were never provided to the agents conducting the criminal investigation of the bombing. Another possible reason is that the relevant conversation was so short and was surrounded by so many hours of silence and insignificant or unintelligible dialogue that earlier agents simply never heard the incriminating portion.

87. *See id.* at 192–94.

88. *See id.* at 220–22.

89. *Id.* at 222.

90. *See* Rick Bragg, *Alabama Faces Old Wound In One Last Trial*, N.Y. TIMES, May 12, 2002, at A1; Yvonne Lamb, *Birmingham Bomber Bobby Frank Cherry Dies in Prison at 74*, WASHINGTON POST, Nov. 19, 2004, at B5.

91. Record at Vol. 3, p. 464.

92. *See* Record at Vol. 3, pp. 468–71. It was at this point, after the trial of Tommy Blanton, that I, then an Assistant United States Attorney in the Northern District of Alabama, became directly involved in the case. Due to the departure from the U.S. Attorney's Office of the lead prosecutor, U.S. Attorney Doug Jones, I was asked to join the prosecution team. Because of the importance of the case I did not hesitate in agreeing, even though it was entirely unclear at this point that Cherry would ever stand trial.

At Taylor Hardin the staff was able to watch Cherry "essentially twenty four hours a day, seven days a week .... He was observed at times when he knew that he was being watched and at times when he was unaware of surveillance."[93] Cherry was given formal tests that were clearly designed to test his memory and competency. He was also informally tested in ways which were not so obvious in their design and would not have alerted Cherry as to the purpose of the tests. At the end of Cherry's more than two months of commitment, his psychologists had noticed an interesting fact. Whenever Cherry knew that he was being evaluated on his competency to stand trial, he did poorly. However, at all other times he appeared fully capable of "understanding the case against him and assisting in his defense ... the consensus of the staff was unanimous—[Cherry] was faking his lack of memory in order to appear incompetent to stand trial ... "[94] After being presented with these facts, Judge Garrett ruled that Cherry's competency had been restored.[95] Therefore, Cherry was now able to adequately assist in his own defense.

At the time that Cherry was found competent to stand trial, the case against him was built largely on the handful of witnesses who claimed to have heard him brag about his involvement in the bombing. However, there were a number of problems with this evidence. The witnesses closest to Cherry had obvious reasons to be biased against Cherry. His ex-wife's testimony was incriminating but, after all, she was an ex-wife, and for obvious reasons juries often disregard the testimony of ex-spouses. His granddaughter's testimony was likewise damaging, but questionable because she had a motive to disparage Cherry since there were allegations that Cherry had sexually abused her. Additionally, no other member of Cherry's family ever heard (or, perhaps more accurately, admitted to hearing) similar statements by Cherry about his involvement in the bombings.

Another problem involved the timing of the alleged statements and, even more problematic, the timing of the witnesses' reporting of them. In most cases, the statements were made by Cherry many years after the crime.[96] Also, in every case, the witness hearing the remark did not promptly report it to anyone.[97] Moreover, there was some question among

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93. Record at Vol. 6, p. 1070.

94. *Id.*

95. Record at Vol. 3, p. 475.

96. In addition to the delayed statements reported by Cherry's ex-wife and granddaughter, Michael Wayne Gowins reported that Cherry told him "[y]ou know I bombed that church" in the early 1980s—approximately twenty years after the bombing. Record at Vol. 10, p. 224.

97. The witnesses had various explanations for their delay in reporting Cherry's statements. The triggering event for most of the witnesses was Cherry's press conference in July of 1997 denying his involvement. Most of the witnesses who came forward to tell of earlier bragging by Cherry did so in reaction to this public denial of responsibility.

the witnesses as to what act or acts Cherry admitted. Some witnesses said that he confessed to making the bomb, while others said he admitted placing it at the church.[98]

However, there was an even greater problem with Cherry's alleged statements. In the strange and twisted subculture of Klan racists that Cherry frequented, being one of the church bombers would be a "badge of honor." Given this mindset, it is certainly not beyond the realm of possibility that a person might brag about being involved in the bombing when, in fact, he had nothing to do with it. Thus, it was entirely possible that a jury might believe that we had proven that Cherry said all these things, but still not believe beyond a reasonable doubt that he actually was involved in the bombing.

For all these reasons, prosecutors thought it was important to look for more evidence to link Cherry to the bombing. We did not need a "knock out blow"—just evidence that tended to show that Cherry either participated directly in carrying out the church bombing or assisted other Klan members in it.[99] Ideally, the gold standard of proof to show this would have been something close in time to the bombing itself (a matter of days, weeks or months) which tended to link Cherry to the bombing and would also corroborate the statements made years later.

The single most powerful piece of evidence in the earlier trial against Tommy Blanton had been the so-called "kitchen tape." At first glance, however, it appeared that the tape would not be particularly useful in Cherry's trial. Cherry's voice is never heard on it, nor is his name even mentioned.[100] Also, because it was not a recording of Cherry, it appeared, at least initially, to be inadmissible hearsay. A closer examination of the kitchen tape, however, revealed that the tape established an extremely important fact in the case: the time and place of the meeting at which Blanton said the bombing was planned and the bomb was made. Although there is some initial discussion on the tape between Tommy and Jean about "the river" (an apparent reference to the Cahaba River—a known Klan meeting place), it becomes apparent several seconds into the tape that the two quickly shift to discussing a different meeting.

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98. Wayne Brogdon (the brother of Cherry's ex-wife Willadean) said that Cherry told him that Cherry helped make a bomb that was used on "[f]our kids in a church house." Record at Vol. 10, p. 190. Willadean, however, said that Cherry told her that he "lit the fuse"—implying that he was present when the bomb was placed. Record at Vol. 10, p. 142.

99. Under Alabama law, it would not be necessary for the State to prove that Cherry actually performed any act relating to the bombing (such as making the bomb or placing it at the church). If we could show that Cherry knew of the bombing in advance and provided any assistance whatsoever to others who committed it, under the legal principle of accomplice liability he would be just as guilty as the actual bombers. *See* ALA. CODE § 14-14 (1958).

100. *See* Record at Vol. 7, pp. 1402–03.

The incriminating portion of the kitchen tape, in its entirety, is:

[J]ean: Well, you never bothered to tell me what you went to the river for Tommy.

Blanton: What did you tell them I did?

Jean: You didn't even.

Blanton: What did you tell them I did at the river? What did they ask you I did at the river?

Jean: They asked me what you went for and I told them I didn't know.

Blanton: They were interested in that meeting that I went to. They knew I went to the meeting.

Jean: What meeting?

Blanton: To the Big One.

Jean: What Big One?

Blanton: The meeting where we planned the bomb.

Jean: Tommy, what meeting are you talking about now?

Blanton: We had that meeting to make the bomb.

Jean: I know that ... It's what you were doing that Friday night when you stood me up.

Blanton: (unintelligible) Oh, we were making the bomb.

Jean: Modern Sign Company.

Blanton: Yeah.

Jean: I tell you what got me is when they told me that Modern—some people at Modern Sign Company said you weren't there.

Blanton: Said I wasn't there.

Jean: Mm, hmm.

Blanton: Oh, well that's ...

> Unknown Male: Jean, (unintelligible) you [don't] learn anything with the FBI. Every breath they utter is a lie.
>
> Jean: I know, but I didn't know that then and I didn't know whether to think you stood me up to go out with somebody else. That's the first thing that hit me. You stood me up to go out with Waylene.[101]

When Blanton says "they [the FBI] knew I went to the meeting," Jean asks "[w]hat meeting?"[102] After Blanton clarifies that he is now talking about "the Big One"—that is, the meeting where they planned and made "the bomb"—Jean responds, "Modern Sign Company," then in the next sentence says, "I tell you what got me is when they [the FBI] told me that ... some people at Modern Sign Company said you weren't there."[103] Blanton assures her that he was at the Modern Sign Company, and an unknown man on the tape states, "Jean, you [don't] learn anything with the FBI. Every breath they utter is a lie."[104] Jean establishes the exact date of the critical meeting two different times in the conversation, saying "[i]t's what you were doing that Friday night when you stood me up" and, several seconds later, "I didn't know whether to think you stood me up to go out with somebody else ... [y]ou stood me up to go out with Waylene ..."[105]

In 1963 the Modern Sign Company, a known Klan hangout owned by Klan sympathizer Merle Snow, was located at the corner of Third Avenue North and Sixteenth Street—three blocks from the Sixteenth Street Baptist Church. Based on this evidence, prosecutors concluded that the "kitchen tape" did more than just provide damning evidence against Tommy Blanton. It also established the time and place of the critical meeting at which the conspirators planned and perhaps even made the bomb used for the church bombing: Friday night, September 13, at the Modern Sign Company.[106] The question now was, where was Bobby Frank Cherry the night of Friday, September 13?

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101. Record at Vol. 7, pp. 1402–03. The "Waylene" that Jean refers to is Waylene Vaughn, another girlfriend of Tommy Blanton's. According to Jean's testimony at trial, the night she was referring to on the kitchen tape was the night of Friday, September 13, 1963. *See* Record at Vol. 9, p. 85.

102. Record at Vol. 7, p. 1402.

103. Record at Vol. 7, p. 1403.

104. *Id.*

105. *Id.*

106. In CARRY ME HOME, her Pulitzer Prize winning history of Birmingham, Diane McWhorter discussed possible explanations as to when and where the bomb was made. She acknowledged that most investigators have speculated that the bomb was built at the garage of Klansman Troy Ingram on Saturday night, September 14th, but went on to note that some theories hold that the bomb was made at the Modern Sign Company, perhaps

Proving the exact location of a given person at a specific time is often a difficult task, even when the time in question is in the recent past. Proving Cherry's whereabouts on a specific evening after more than thirty eight years appeared to be nearly impossible. By 2002, the church bombing case file maintained by prosecutors and agents consisted of thousands and thousands of documents, pictures, audio recordings, videotapes, and other pieces of evidence.[107] Buried in this mountain of evidence, however, prosecutors found the final break they needed to connect Cherry with the bombing nearly thirty-nine years before—a five page, handwritten statement.[108]

Shortly after the church bombing Cherry became a prime suspect. FBI agents did not immediately attempt to interview him, however, instead deciding to wait for more than three weeks.[109] On October 9, 1963, FBI Special Agents Joseph Ayers and Carl Welton met with Cherry and discussed the bombing.[110] Cherry denied having any knowledge about who bombed the church.[111] When asked where he was on Friday, September 13, Cherry responded that he spent the evening helping to make signs for an upcoming motorcade to protest the recent integration of the Birmingham public schools.[112] According to Cherry, the location of the sign-making venture was the Modern Sign Company. Among those that Cherry said were present to make signs that Friday night were Robert

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even on Friday night when "half the dynamite enthusiasts in town seemed to have moved through the shop . . . . " MCWHORTER, *supra* note 2, at 512. At the time she wrote CARRY ME HOME, McWhorter had never heard the kitchen tape (the public did not hear the tape until the trial of Tommy Blanton in April of 2001, shortly after McWhorter's book was published)—a piece of evidence that clearly bolsters the case that the Modern Sign Company was the site of the bomb's construction.

Moreover, due to its location only three blocks from the church (as opposed to Troy Ingram's garage or the Cahaba River Bridge, which were miles away), the sign company was a more logical location for putting together such a large bomb. The church bomb, which was capable of completely destroying the poured concrete stairs next to the church and leaving a huge crater and hole in the church wall, would have been extremely dangerous to transport for long distances.

107. When the FBI reopened the investigation of the church bombing in 1995, the FBI's file on the case consisted of nearly nine thousand documents. Record at Vol. 9, pp. 48–49. By 2002 the investigative file, which had grown even larger due to additional investigation as well as hundreds of pages of grand jury transcripts, consisted of many thousands of pages.

108. *See* Record at Vol. 8, pp. 1425–29.

109. Record at Vol. 9, pp. 93–94 (Cherry's first interview occurred on October 9, 1963).

110. *Id.*

111. Record at Vol. 8, pp. 1425–29.

112. *See id.* at 1426.

Chambliss and Tommy Blanton[113]—the two men who, by the time of Cherry's trial, had been convicted in the bombing.[114]

The agents handwrote what Cherry had told them about Friday evening.[115] In the handwritten statement, Cherry said that he arrived at the Modern Sign Company at 5:30 p.m. and stayed until after midnight.[116] He described in great detail everyone who came to and left the sign company. After writing down what Cherry told them, the agents then instructed Cherry to read the five-page document and to write, in his own handwriting, "I have read the above statement of this and four other pages and it is true and correct to the best of my knowledge."[117] Cherry signed the statement "Bobby F. Cherry."[118]

Prosecutors recognized that the combination of the "kitchen tape" and Cherry's written statement were powerful evidence of Cherry's involvement in the bombing. The tape established the time and place of the critical meeting of the church bombing conspirators, while the written statement put Cherry at the same location during the same time period. Together, they appeared to provide prosecutors with evidence close in time to the bombing itself that corroborated the rest of their case.[119]

However, finding powerful evidence is not the same thing as getting that evidence before a jury. In order to implicate Cherry, prosecutors needed to get both the kitchen tape and the written statement into evidence—only in combination would the two produce the desired inference. Cherry's written statement did not appear to present a problem. It was the statement of an opposing party (the defendant in a criminal case) and so was excluded from the rule against hearsay.[120] Moreover, one of the two agents who took the written statement, Agent Carl Welton,

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113. *Id.*

114. SIKORA, *supra* note 3, at pp. 156, 220–22.

115. Record at Vol. 9, pp. 101–02.

116. Record at Vol. 8, pp. 1426, 1429.

117. *See id.* at 1429.

118. *Id.* Nothing in the case file indicates why the agents took a handwritten statement from Cherry. *See* Record at Vol. 9, pp. 101–02. In fact, standard FBI practice at the time was (and still is) to the contrary. FBI agents normally do not record, whether via audiotape, videotape, or signed statement, the statements of witnesses or suspects, instead relying (often to the dismay of generations of prosecutors) on an agent's paraphrasing of what the witness said on a FBI Form "FD-302." *See* Record at Vol. 9, pp. 46–48. Needless to say, prosecutors were glad that the agents had deviated from standard practice in this case. Cherry's thirty-eight-year-old, handwritten, signed statement, now yellowed but produced at trial in its original form, was a remarkable piece of history—one that would come back to haunt its signator.

119. Prosecutors' belief in the probative effect of the tape and statement were confirmed when they presented the case to a "focus group" of citizens several months before trial. After hearing the kitchen tape, the focus group jurors referred to Cherry's written statement as a "confession."

120. ALA. R. EVID. 801(d)(2).

was still alive at the time of trial and could authenticate the statement as Cherry's.[121]

Admissibility of the kitchen tape, however, was another matter. As an initial matter, the legality of the tape under the Fourth Amendment—which had been much debated at Blanton's trial—would not be an issue here, as Cherry clearly had no legal standing to raise this argument.[122] Moreover, authentication of the tape as genuine did not appear to present a problem as Jean Barnes could identify the voices on the tape as hers and Tommy Blanton's[123] while the FBI agent who placed the tape recorder in the apartment and retrieved the tapes could further authenticate the tape by testifying as to how the recording device functioned. The real problem with the kitchen tape, however, was getting past the inevitable hearsay objection.

Prosecutors' theory of the case was that Cherry, Blanton, Chambliss, and others conspired to bomb the church. As a general rule, statements made by one conspirator during the course of and in furtherance of the conspiracy are admissible against other conspirators as an exception to the rule against hearsay.[124] The problem with arguing that Blanton's statement in the kitchen tape fit the "co-conspirator's statement" exception to the hearsay rule was one of timing. Under the co-conspirator exception, the conspiracy normally ends when the conspirators complete the crime that they are conspiring to commit and any statements made after that time are no longer part of the conspiracy. In this case, the crime was completed on September 15, 1963 and the kitchen tape was not recorded until June 28, 1964—more than nine months later.[125]

There is, however, a narrow exception to the general rule that the conspiracy ends with the completed crime. Under Alabama law, if, after the commission of the crime, some or all of the conspirators participate together in concealing the crime by suppressing or fabricating evidence, then

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121. *See* Record at Vol. 9, pp. 88, 102. The other agent involved in taking Cherry's statement, Special Agent Joseph Ayers, had died by the time of trial, demonstrating the fragile nature of trying a case this old. Had Agent Welton not been alive to authenticate the statement, its admissibility would have been much more problematic.

122. While Blanton could make the argument that he had a reasonable expectation of privacy in a conversation that he and his wife had in his apartment, clearly Cherry had no reasonable expectation that such conversation would remain private. *See* Alderman v. United States, 394 U.S. 165, 171–72 (1969) ("The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself .... Coconspirators and codefendants have been accorded no special standing").

123. Jean claimed that she did not remember the conversation on the tape, but did identify the voices on the tape and testified that the night Tommy stood her up was Friday, September 13, 1963. Record at Vol. 9, pp. 84–85.

124. ALA. R. EVID. 801(d)(2)(E). The rule allowing statements by a co-conspirator is based on the law of agency—each conspirator is an agent of the other conspirators and can speak on their behalf.

125. Record at Vol. 7, p. 1402.

there is a "continuing conspiracy to conceal" and any statements made during the course of and in furtherance of this conspiracy to conceal will be admissible against those involved in the conspiracy.[126] Additionally, Alabama case law explicitly provides that because conspiracies are by their very nature secretive and thus difficult to prove, conspiracies to conceal may be proven by inference and circumstantial evidence.[127]

The fact that the Klan members involved in the bombing of the Sixteenth Street Baptist Church had conspired to conceal their involvement in the bombing seemed self-evident. Indeed, few crimes in history have been so effectively concealed from so many investigators for so long. However, in order to get the tape into evidence prosecutors would have to prove to Judge Garrett's satisfaction[128] both that the church bombers had conspired to conceal the bombing from investigators and that Cherry had been involved in this conspiracy.

Proving the existence of a conspiracy to conceal evidence of the bombing as well as Cherry's involvement in this conspiracy thirty eight years after the bombing was another challenge for prosecutors. This prompted another search for small clues in the massive case file. A number of small pieces of evidence surfaced, however, which provided a glimpse into the highly-secretive cover-up orchestrated by Klan members years before. On October 12, 1963, three days after Cherry was first questioned by the FBI and gave his written statement, Tommy Blanton went to Cherry's house, asked Cherry if he had been interviewed by the FBI, and if so what Cherry had told them.[129] During this conversation, Blanton cautioned Cherry not to say anything near Blanton's car as it was "bugged."[130] In February of 1965 Cherry told Blanton and Edward Fields (Information Director of the racist "National States' Rights Party") that he had "lied all through" the interview he gave the FBI regarding the church bombing.[131] In March of 1965 Blanton and Cherry were driving in a car with an FBI informant named Mitch Burns when Robert Chambliss' name came up.[132] Blanton cautioned Cherry to "[w]atch what

126. *See* Haney v. State, 603 So. 2d 368, 400 (Ala. Crim. App. 1991) (finding a taped statement of triggerman admissible against defendant when defendant and triggerman conspired for more than three years to maintain alibis and suppress evidence); Duncan v. State, 827 So. 2d 838, 852–54 (Ala. Crim. App. 1999) (citing Haney, 603 So. 2d at 399–400).

127. Haney, 603 So. 2d at 399–400 (citing Conley v. State, 354 So. 2d 1172, 1177 (Ala. Crim. App. 1977)).

128. The threshold question of whether there was enough evidence of a conspiracy to conceal, such that jurors should be allowed to hear the tape, was a question for the trial judge to decide. *See* ALA. R. EVID. 104(a) (recognizing that preliminary questions intended to establish conditions precedent to admissibility are for the court rather than the jury).

129. Record at Vol. 9, pp. 113–14.

130. *Id.* at 116–17.

131. Record at Vol. 8, pp. 1447–48.

132. *See* Record at Vol. 7, p. 1376.

you say around this boy right here Bobby, uh, he don't know too much. Need to keep it that way."[133] In the same conversation Cherry told Blanton and Burns "I wouldn't tell them [the FBI] shit . . . " and "I wouldn't tell them [the FBI] nothing, I wouldn't even tell them what time it was . . . "[134] Finally, there was irrefutable evidence that Cherry had misled the FBI during his interviews, as there were numerous conflicting statements regarding his membership in the Klan[135] and his relationship with Blanton[136] and Chambliss.[137] Based on this evidence, prosecutors were relatively confident that they could convince Judge Garrett that Cherry had been involved with Blanton and the other church bombers in attempting to hide the group's involvement in the bombing, thus making the kitchen tape admissible as the statement of a co-conspirator.

Jury selection for the trial of Bobby Frank Cherry began on May 6, 2002.[138] After the one hundred and fourteen potential jurors[139] filled out a jury questionnaire, prosecutors and defense attorneys questioned each of the potential jurors individually. Twelve jurors were selected (including six

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133. *Id.* The conversation between Cherry, Blanton, and Burns was recorded by a secret FBI tape recorder that Mitch Burns allowed agents to place in the trunk of his car. *See* Record at Vol. 20, pp. 538, 548–49.

134. Record at Vol. 7, p. 1384.

135. In 1997 Cherry told investigators, and also announced during his press conference, that he had quit the Klan approximately a year before the bombing. *See* Record at Vol. 11, p. 404. However, in October 1963 Cherry had told FBI agents that he was a member of the Klan "security guard" and in September 1964 he told agents that while he was not regularly attending Klan meetings because of his "responsibilities at home," he planned to actively participate when he could. Record at Vol. 9, p. 99; Record at Vol. 10, pp. 248–49.

136. In October 1963 Cherry told agents that he had met Blanton only two or three times about two or three years before. He called Blanton a "trouble maker" and a "smart aleck." Record at Vol. 9, pp. 95–96. In 1997 Cherry told investigators that he always thought Blanton was a "little thief" and would not let Blanton come in his house. Record at Vol. 11, p. 408. However, at other times Cherry admitted to having had numerous contacts with Blanton, and during the conversation recorded in Mitch Burns' car, Cherry and Blanton talked like friends, with Blanton assuring Cherry "when I don't trust somebody I don't get nowhere near them." Record at Vol. 7, p. 1374; Record at Vol. 9, pp. 96–99.

137. In 1997 Cherry initially told investigators that he did not know Chambliss well. Record at Vol. 11, pp. 402–08. Later in the same interview, however, Cherry says that he knew Chambliss "about as well as anyone did." *Id.* at 408. On tape in 1965 Cherry is heard to say "we all like ole Bob [Chambliss]" and that everyone "think[s] the world of him." Record at Vol. 7, p. 1379.

138. *See* Record at Vol. 20, p. 1. The prosecution of Cherry was truly a team effort, with prosecutors coming from the local United States Attorney's Office (Assistant United States Attorney Robert Posey and I, both appointed as "Special Assistant Attorneys General" by Alabama Attorney General Bill Pryor), the Jefferson County District Attorney's Office (Deputy District Attorney Jeff Wallace), and private practice (former United States Attorney and lead prosecutor Doug Jones, also appointed as a "Special Assistant Attorney General" by Bill Pryor).

139. Chanda Temple, *Cherry Jury Selection Continues*, BIRMINGHAM NEWS, May 13, 2002, at B1.

White females, three White males, and three Black males)[140] after five days of individual questioning. There were no African American females on the jury.[141] Most of the jurors were too young to remember the church bombing.[142]

We began presenting our evidence in the case on Tuesday, May 14.[143] Without any physical evidence linking the defendant to the crime (indeed, without any physical evidence at all) or any eyewitness who could place Cherry near the church, the case consisted entirely of circumstantial evidence that had to be woven together into a compelling story. Our first witness was chosen for maximum emotional impact. Alpha Robertson, the mother of Carole Robertson, spoke of her daughter and the day of the bombing in a voice that combined the raw power of moral authority with the intense sadness of a mother who still remembered the fourteen-year-old daughter she lost thirty eight years before.[144] Alpha testified about Carole and about the day of the bombing, remembering details such as the fact that Carole was wearing her first pair of heeled pumps and had stage fright about singing in front of the entire church—small details that made the loss so many years ago more human.

The next set of State's witnesses was intended to give jurors an insight into the events leading up to the bombing, as well as provide a picture of what the Birmingham of the 1950s and 1960s was like. James Armstrong, the father of the two boys who had integrated Graymont Elementary School on September 10, 1963, told jurors how local Black community leader Fred Shuttlesworth had tried in 1957 to enforce the United States Supreme Court's decision in *Brown v. Board of Education*[145] by attempting to enroll his children in Birmingham's all-White Phillips High School.[146] Shuttlesworth was met by a mob of White men, who beat him

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140. Chanda Temple & Val Walton, *Jury Verdict in Bombing Hailed as "Justice Finally"*, BIRMINGHAM NEWS, May 23, 2002, at A1.

141. *See id.* Media accounts at the time made much of the racial composition of the jury, and indeed the absence of more Blacks, and particularly Black females, on the jury was a concern to some members of the prosecution team. Others on the team, including myself, felt that the case, with its compelling story of the murder of four innocent children in church on a Sunday morning and the ability to tie the defendant to the bombing through the combination of the kitchen tape and Cherry's written statement, was strong enough that the racial and gender makeup of the jury should not matter.

142. Jerry Mitchell, *Bombing-Trial Jurors Recall Decision*, JACKSON CLARION-LEDGER, Feb. 24, 2003, at 1A.

143. *See* Record at Vol. 18, p. 135.

144. *See* Record at Vol. 18, pp. 166–74.

145. Brown v. Board of Educ., 347 U.S. 483 (1954). In its landmark decision, the United States Supreme Court unanimously held that public schools that were ostensibly "separate but equal" violated the United States Constitution.

146. *See* Record at Vol. 18, pp. 176–77.

and attacked his family.[147] Armstrong told jurors that there were no further attempts to integrate Birmingham schools until he filed, on behalf of his children, the lawsuit that eventually resulted in their admission to all White Birmingham public schools.[148]

Another witness, Jim Parker, a cameraman for a local television station, testified that he was present at Phillips High School the day Reverend Shuttlesworth attempted to integrate the school, having gone to pick up a transcript.[149] When he saw Shuttlesworth and the mob, Parker ran back to his car to get his camera and began filming the incident.[150] His footage was shown on national news at the time and, years later, in the Spike Lee documentary FOUR LITTLE GIRLS.[151] Parker remembered that the mob arrayed against Shuttlesworth included about thirty to forty people standing on the sidewalks yelling racial remarks, a group of around fifteen in the street surrounding Shuttlesworth and his family, and a still smaller group of around five or six who were directly involved in the violent confrontation.[152] Of all those present, Parker specifically remembered one particular man who reached into his back pocket and pulled out an object that he then swung at Shuttlesworth.[153]

Bobby Birdwell, a friend of Cherry's son, was eleven years old at the time of the bombing and was able to identify this man. Birdwell told jurors that four or five days before the bombing he happened to go into Cherry's house to get a drink of water when he saw Cherry seated at the kitchen table with three other men.[154] He saw a Klan robe in the house and heard one of the men say "bomb" and "Sixteenth Street."[155] Birdwell was shown the video that Jim Parker had taken at Phillips High School in 1957 and asked if he recognized anyone.[156] Birdwell recognized the man

147. *Id.* at 177–79.

148. *See id.* at 179–80. Testimony regarding the attempts to integrate Birmingham schools was legally relevant because the State's theory of the case was that it was the Klan's hatred of Blacks, and specifically a violent reaction to the integration of public schools, that led to the bombing five days after the schools were integrated for the first time.

149. *Id.* at 197–98.

150. *Id.* at 198–200.

151. FOUR LITTLE GIRLS (HBO 1997).

152. Record at Vol. 18, pp. 200–02.

153. *Id.* at 203. When asked why he sold his tape to a news station for money instead of turning it over to the police, Parker responded—somewhat perplexed—that a number of police officers were present during the beating (so he assumed that the police were aware of the situation). *See id.* at pp. 231–32.

154. *Id.* at 214–16.

155. *Id.* at 215–17.

156. *Id.* at 221.

who reached into his back pocket and then hit Shuttlesworth as Bobby Frank Cherry.[157]

The story of the bombing of the Sixteenth Street Baptist Church was woven together through the testimony of approximately thirty more witnesses.[158] Members of the girls' families told jurors about the events at the church the day of the bombing,[159] explosive experts testified that the blast was a bomb rather than a gas leak or boiler explosion,[160] and retired FBI agents testified about Cherry's conflicting statements.[161] Other witnesses, including Michael Wayne Gowins and Willadean Brogdon, testified that Cherry had bragged to them about being involved in bombing the church.[162] After hearing the State's evidence regarding Cherry's participation in the conspiracy to conceal the bombing, including the testimony of FBI informant Mitch Burns and the tape recordings made of Cherry and Tommy Blanton in Burns' car, Judge Garrett ruled that the "kitchen tape" was admissible as a co-conspirator's statement, and the tape was played for the jury.[163] Jurors also saw Cherry's yellowed, handwritten statement taken less than a month after the bombing in which Cherry placed himself at the Modern Sign Company on the Friday night before the bombing.[164]

At two times during the trial, Cherry's own words came back to haunt him. When interviewed by Detective Herren in 1997, Cherry told Herren that he had quit the Klan a year before the bombing because his

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157. *See id.*; Rick Bragg, *Prosecutors Try to Recreate Birmingham's '63 Nightmare*, NEW YORK TIMES, May 15, 2002, at A1. When interviewed by the FBI in 1997, long after the statute of limitations had run on any potential prosecution for assault, Cherry bragged that he had "bopped" Shuttlesworth between the eyes with his brass knuckles that day at Phillips High School. *See* Record at Vol. 11, pp. 402, 413. Evidence of the earlier assault on Shuttlesworth was admissible under Rule 404(b) of the Alabama Rules of Evidence because it showed that Cherry had the motive necessary to bomb the church, as both the Shuttlesworth incident and the church bombing were motivated by a hatred of Blacks and, specifically, a desire to prevent school integration—by violence if necessary. *See* ALA. R. EVID. 404(b).

158. *See* Record at Vol. 9, p. 3; Record at Vol. 17, p. 3.

159. *See supra* note 144.

160. *See supra* note 47.

161. *See supra* notes 135–37.

162. *See* SIKORA, *supra* note 3, at 233–37.

163. *See* Record at Vol. 9, p. 86.

164. *See* Record at Vol. 8, pp. 1425–26; Record at Vol. 9, pp. 101–02; Jerry Mitchell, *Church Bombing Trial Goes to Jury*, JACKSON CLARION-LEDGER, May 22, 2002, at 4A. These two pieces of evidence—the heart of our case against Cherry—were not explicitly woven together until closing argument. One juror later told me, however, that she immediately understood the connection between the two and knew that Cherry was guilty. By contrast, members of the international media present in court for the trial did not grasp the significance of the "kitchen tape" and written statement, largely because the tape was difficult to understand when played in court (the judge, jurors, and attorneys had a transcript of the tape, as well as special headsets to hear the tape clearly).

wife was sick with cancer.[165] The only problem with Cherry's version of events was that his wife's medical records, introduced by the prosecution at trial, showed that she was not diagnosed with cancer until August of 1965.[166] Additionally, Cherry told Herren that he went home on the Saturday night before the bombing and watched wrestling on TV.[167] However, logs of all Birmingham TV programming placed into evidence showed that there was no wrestling on TV in Birmingham on that night.[168] Cherry chose not to testify at trial.[169] Rather, his defense consisted of a confusing attempt to blame the FBI for making him a scapegoat. Cherry's defense was that one individual—Robert Chambliss' sister-in-law Mary Frances Cunningham—had mistakenly identified him as one of the four bombers in her statement to the FBI shortly after the bombing. This one statement, according to Cherry's theory, led the FBI to undertake a thirty-nine-year quest to convict him of a bombing in which he had no part. Cherry also called to the stand a number of character witnesses, including the preacher at his church in Dallas, who said that Cherry "fit right in" with the multi-racial congregation at the church, and a grandson who, when asked if he ever heard his grandfather use a racial slur said, "No—only the use of the word nigger."[170]

During closing arguments, Cherry's attorneys pressed their theory that Cherry was just a convenient scapegoat—admittedly a racist, but not a bomber.[171] On the prosecution side, lead prosecutor Doug Jones and I argued that words from the mouths of two of the bombers themselves, Tommy Blanton on the kitchen tape and Cherry in his handwritten statement, proved that Cherry was present at the critical meeting of the conspirators at the Modern Sign Company on Friday night when the bombing was planned.[172] I argued that the jury could either believe that Cherry was truthful when he boasted of his direct involvement in helping to make or place the bomb, or they could believe that he was present at the sign company and involved in planning the bombing, thus guilty under the principle of accomplice liability.[173] Either way, he was guilty of

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165. Record at Vol. 11, pp. 401–04.

166. Jerry Mitchell, *Bombing-Trial Jurors Recall Decision*, JACKSON CLARION-LEDGER, Feb. 24, 2003, at 1A.

167. Record at Vol. 11, pp. 402, 418.

168. Jerry Mitchell, *Bombing-Trial Jurors Recall Decision*, JACKSON CLARION-LEDGER, Feb. 24, 2003, at 1A.

169. *See* SIKORA, *supra* note 3, at 244.

170. Rick Bragg, *Defense Rests After One Day In '63 Bombing*, N.Y. TIMES, May 21, 2002, at A1.

171. *See* Rick Bragg, *More Than Just a Racist? Now The Jury Must Decide*, N.Y. TIMES, May 22, 2002, at A1.

172. *See* Record at Vol. 24, pp. 148–49.

173. *See* ALA. CODE § 14-14 (1958).

murder. Interestingly, although Doug and I did not discuss our arguments prior to giving them, we both ended by returning to one of the trial's most poignant images—a photograph of Denise McNair taken by her father. In the picture, Denise hugs her favorite doll against her cheek. The doll is White.[174]

After about a day of deliberating, the jury returned its verdict. Bobby Frank Cherry was found guilty of four counts of murder[175] for the killings of Addie, Carol, Cynthia, and Denise. Cherry's sentence was life in prison.[176] Before pronouncing sentence, Judge Garrett asked Cherry if he had anything to say. Cherry turned to our team of prosecutors and investigators and said, "This whole bunch have lied all through this thing ... I've told the truth. I don't know why I'm going to jail for nothing."[177]

## IV. THE CHERRY PROSECUTION AS "TRANSITIONAL JUSTICE"

A question that I am often asked about the Cherry prosecution is: why use so many resources just so that an old man could spend the end of his life in prison?[178] In one sense, the short answer is that there is no statute of limitations for murder and, at least theoretically, any murderer can and should be prosecuted at any time up to his death. But this answer, although legally correct, does not fully justify the resources that the federal government and the state of Alabama spent on years of investigation and what amounted to a long shot gamble of a prosecution of a seventy-two-year-old man. To assess whether the prosecution was justified, perhaps it is helpful to analyze it as an American application of principles gleaned from the rapidly expanding field of "transitional justice."

Transitional justice is "the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes."[179] Modern transitional justice traces it roots to the period following World War II.[180] The post-World War II model of transitional justice, seen most clearly in the prosecutions at Nuremberg, was based on international cooperation in the

174. Rick Bragg, *Survivor of '63 Bomb Recalls Glass Shards and a Sister Lost*, N.Y. TIMES, May 18, 2002, at A1.

175. SIKORA, *supra* note 3, at 252.

176. *Id.*

177. Rick Bragg, *38 Years Later, Last of Suspects is Convicted in Church Bombing*, N.Y. TIMES, May 23, 2002, at A1.

178. Bobby Frank Cherry died on November 18, 2004, his "life sentence" consisting of two and a half years in an Alabama prison. *See* Yvonne Lamb, *Birmingham Bomber Bobby Frank Cherry Dies in Prison at 74*, WASHINGTON POST, Nov. 19, 2004, at B5.

179. Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 69 (2003).

180. Symposium, *The Law and Politics of Contemporary Transitional Justice*, 38 CORNELL INT'L L.J. 837, 839 (2005).

criminal prosecution of Nazi war criminals. Despite the fact that the Nuremberg trials remain largely anomalous, the model they established had a significant impact on the law of transitional justice.[181] Nuremberg shaped the law in this area by shifting the focus from national to international mechanisms, and from collective to individual guilt.[182] The period immediately following World War II was the high water mark of international justice and cooperation.[183] This period saw not only the Nuremberg trials, but also the founding of the United Nations and the passing of a number of conventions and resolutions establishing international crimes.[184]

The Cold War brought an end to the era of international cooperation, but a new phase in transitional justice began with the breakup of the Soviet Union and its empire in the 1980s.[185] The revolutions in Eastern Europe, new democracies in Central and South America, and the democratization of South Africa were all examples of this second phase of transitional justice.[186] The Nuremberg model of justice, based on international criminal prosecution, worked in some of these countries, but in others the desire for justice and punishment had to be balanced against other values, such as the search for truth, the need to preserve the peace, or the desire for reconciliation and nation building. Examples of criminal trials as a form of transitional justice include France's 1987–88 trial of alleged Nazi Klaus Barbie and Israel's 1961 prosecution of Adolph Eichmann.[187] "Truth commissions"–a response designed to search for the truth while preserving the peace–were employed in many Latin American countries (such as Argentina, Chile, El Salvador, Honduras, Haiti, and Guatemala) and African nations (Chad, Uganda, and South Africa).[188] Due to different balancing of these interests in different countries, multiple conceptions of transitional justice emerged during this phase.[189] Some countries opted for trials, while others chose truth commissions, reparations, apologies, purges, or some combination of these measures.[190] Thus, transitional justice today does not comply exclusively with any one system. Although the Nuremberg model of international criminal prosecution has seen a recent revival in the International Criminal Court[191] and the International Criminal Tribunal for the former

181. *See* RUTI G. TEITEL, TRANSITIONAL JUSTICE 31 (Oxford University Press 2000).
182. *Id.*
183. *See* Teitel, *supra* note 179, at 73.
184. TEITEL, *supra* note 181, at 32.
185. *See* Teitel, *supra* note 179, at 75.
186. *See id.* at 71.
187. *See* TEITEL, *supra* note 181, at 74–76.
188. *Id.* at 79–80.
189. Teitel, *supra* note 179, at 76.
190. *See id.* at 75–76.
191. *Id.* at 90.

Yugoslavia,[192] other countries have chosen different tools to exact justice in their transition.

Some commentators view transitional justice with suspicion, noting that it is "backward-looking" and incapable of ensuring prospective security because it is always looking back to the last conflict.[193] Others argue that new governments should reserve their limited resources for forward-looking measures that help build the state, such as measures contributing to economic growth and political cohesion.[194] Recently, however, Eric Posner and Adrian Vermeule have argued that there is no reason to treat transitional justice measures with any more suspicion than the "ordinary justice" of consolidated democracies like the United States.[195] Under this view, justice during times of transition, whether that transition occurs during regime change in a foreign country or one of the wide variety of transitions that occur in a consolidated democracy like the United States, must be analyzed by a pragmatic balancing of the costs and benefits of the transitional justice measures employed rather than the naive assumption that the benefits are decisive in every case.[196] Depending on the costs and benefits involved, transitional justice measures may be "backward-looking" and counterproductive or "forward-looking" and worthwhile.

Although the transitional justice paradigm has almost universally been applied in the international context, the construct does appear to fit the American South of the 1960s.[197] Clearly, many of the state, county, and

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192. *See supra* note 180, at 841.

193. Ruti G. Teitel, *Theoretical and International Frameworks: Transitional Justice in a New Era*, 26 FORDHAM INT'L L.J. 893, 905 (2003). In a sense, of course, all justice is "backward-looking." What critics of transitional justice appear to mean when they voice this criticism is that the new regime is looking backward at a time when it should be looking forward—that is, its focus is counterproductive because it interferes with development of the new democracy and its economy. *See* Eric A. Posner and Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 762, 825 (2004).

194. CLAUS OFFE, VARIETIES OF TRANSITION: THE EAST EUROPEAN AND EAST GERMAN EXPERIENCE 84 (Polity Press 1996)("after the demise of the old regime, and confronted with the chaos it has left behind, we have more important things to care about than retroactive justice").

195. *See* Eric A. Posner and Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 762, 764–65 (2004).

196. *Id.* at 825. According to Posner and Vermeule, costs of transitional justice measures include overburdening the courts, draining the treasury, burdening officials with complex technical problems, and confronting the judicial system with insoluble moral dilemmas. *Id.* Benefits, while harder to quantify, include providing a method for the public to recapture lost traditions and institutions, depriving former officials of influence that they could use to frustrate reform, signaling a commitment to the market and democratic institutions, and establishing precedents that may deter future leaders from repeating the abuses of the previous regime. *See id.* at 766.

197. *See* TEITEL, *supra* note 181, at 251 n.152 (citing the Mississippi trial of Byron De La Beckwith for the murder of Medgar Evers in 1963 as an American example of transitional justice).

local governments of the Southern United States of fifty years ago were "repressive regimes" to their African American citizens and, equally clearly, there has been a significant transition since that time.[198] An analysis of the prosecution of men like Bobby Frank Cherry as a type of transitional justice measure, subject to a balancing of costs and benefits, as well as the weighing of values such as the desire to discover the truth, preserve the peace, or find reconciliation would be an interesting exercise. Without attempting to definitively resolve the issue of whether such prosecutions are justified—something beyond the scope of this Article—it appears that there are arguments on both sides of the issue.[199]

On the one hand, the financial costs of such prosecutions are clearly high. Moreover, the prosecution of an old man for a crime he committed nearly forty years ago certainly appears more backward-looking than forward-looking. More fundamentally, some have cynically noted that the recent civil rights prosecutions may be more about restoring the "damaged virtue" of White America than curing the persistent injustice they purport to address.[200]

On the other hand, there also appear to be significant benefits to such trials. One overriding point that emerges from the law of transitional justice is that not all time periods in the life of a country are created equal. As Posner and Vermeule note, certain historical periods in the life of a nation take on heightened importance and will always be more "vivid and visible" to future generations, creating important social and constitutional precedents.[201] In emerging democracies these highly visible historical moments occur primarily at times of regime transition.[202] While consolidated democracies like the United States may not experience such moments of heightened significance at times of "regime change" (which ordinarily occurs relatively smoothly in modern democracies via democratic elections), such moments do exist at times of major constitutional transition.[203] If the civil rights struggle in the American South in the

198. Some would argue that the transition away from repression for Blacks is not yet complete in the South. Although that may be true, it is apparent that the last fifty years have brought significant improvement in the rights of Blacks in the South.

199. It is my intention to return to this topic and explore in more detail the value of the recent civil rights murder trials in the South and the question of whether such trials should properly be viewed as a type of transitional justice and, if so, whether the costs associated with these trials are worth whatever long-delayed benefit they may provide.

200. Diane McWhorter, *No Trial Closes Injustice's Wounds*, USA TODAY, May 22, 2002, at 12A (during such trials "the core cause of the conflict—the permanent fallout from America's original sin of slavery—gets buried in the largely symbolic ceremonies of reconciliation").

201. Posner and Vermeule, *supra* note 195, at 792 n.92.

202. *Id.*

203. *Id.* Posner and Vermeule cite Reconstruction and the New Deal as examples of times of constitutional transition in the United States. *Id.*

second half of the twentieth century did present such a period of heightened visibility and significance, the benefits of prosecuting men like Bobby Frank Cherry, vividly showing future generations that even in times of major social and constitutional turmoil the truth will eventually come out, may have been worth the costs. However, it is apparent that this is a complex question, not susceptible to simple analysis through a mechanical balancing of costs and benefits.

## CONCLUSION—JUSTICE DELAYED OR JUSTICE DENIED?

The transitional justice paradigm appears to provide a useful lens through which to view prosecutions like the one of Bobby Frank Cherry. The initial question under such an analysis—discussed above—is whether the prosecution of a handful of old men is worth the expenditure of the considerable resources required to mount this type of prosecution. A related question, frequently raised in the wake of the verdicts like that in the Cherry case, is whether or not justice that is so long delayed is really justice at all, or has justice been denied?

In a perfect world, or even a reasonably just world, Bobby Frank Cherry would not have lived for nearly thirty-nine years as a free man after committing the most heinous crime of the civil rights era. Certainly all of us involved in the church bombing prosecutions, although we felt that a measure of justice had been done by sending the men responsible to prison, also felt frustration in the fact that the bombers had spent so much of their lives as free men, especially in light of the fact that the FBI had in its possession the entire time the evidence that proved most pivotal in eventually convicting them.[204]

Perhaps the transitional justice paradigm again helps here. Ruti Teitel has observed that there is a "complicated relationship between transitional justice, truth, and history."[205] According to Teitel, interest in the pursuit of such justice does not necessarily wane with the passage of time because "transitional justice relates to exceptional political conditions, where the state itself is implicated in wrongdoing and the pursuit of justice necessarily awaits a change in regime."[206] The reality is that Birmingham, Alabama in the 1960s was far from a perfect world and justice was in short supply when victims were Black and suspects were White. In such a world,

204. When he became aware of the existence of the tapes made in Mitch Burns' car and the "kitchen tape," former Alabama Attorney General Bill Baxley was so frustrated that he wrote a letter to the NEW YORK TIMES blasting the FBI for its recalcitrance during his investigation in the 1970s. SIKORA, *supra* note 3, at 185. Baxley's point was that had he had been given access to the complete FBI file, he might have been able to bring charges against Cherry and Blanton at the same time that he charged Chambliss. *Id.*

205. Teitel, *supra* note 179, at 86.

206. *Id.*

sometimes justice takes time. At the funeral for three of the church bombing victims, Reverend Martin Luther King, Jr. eloquently predicted the short-term effects that the bombing of the Sixteenth Street Baptist Church would have on the conscience of White America.[207] Perhaps he also foresaw the eventual prosecution of the bombers when he said "the arc of the moral universe is long, but it bends toward justice."[208] In the case of Bobby Frank Cherry, the arc was nearly forty years long. In the end, however, it did finally bend to justice.

207. *See* Rick Bragg, *38 Years Later, Last of Suspects is Convicted in Church Bombing*, N.Y. TIMES, May 23, 2002, at A1.

208. BRANCH, *supra* note 1, at 197.